Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Petition of BellSouth Telecommunications, Inc.	)	
For Forbearance Under 47 U.S.C Sec. 160(c) from	)	WC Docket No. 04-405
Application of Computer Inquiry and Title II	)	
Common-Carriage Requirements	)	

REPY COMMENTS OF MCLEODUSA TELECOMMUNICATIONS SERVICES, INC.

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Summary

Commenters filing in support of the BellSouth petition, like BellSouth, fail to justify forbearance under the standards of Section 10 of the Act. In particular, they fail to provide the rigorous identification and analysis of markets that the courts have required in order for the Commission to forbear from important statutory and regulatory requirements. Because they fail to perform the necessary analysis of markets, the forbearance request would apparently also apply to special access services which the Commission has previously chosen to exclude from consideration as within the scope of broadband relief. The petition should be denied for these reasons alone.

Even overlooking the failure to adequately address separate markets, BOCs have not acknowledged, much less addressed, that there is no intermodal competition in the wholesale market for broadband access to customers' premises. This is particularly important because *Computer II/III* safeguards were designed to assure a viable wholesale market for last mile access to customers. In the retail residential market, there is at most a duopoly for the provision of high-speed Internet access service which the Commission has recognized is insufficient to replace regulation to assure that rates for service are reasonable and nondiscriminatory. And, there is limited or no intermodal competition in the retail business broadband market. Therefore, the Commission may not conclude on the present record that intermodal competition is sufficient to assure reasonable and nondiscriminatory terms and conditions of service for any broadband service. Even if there were sufficient competition to warrant a finding that ILECs are nondominant in some broadband markets, this would not warrant the sweeping forbearance sought by BellSouth because the Commission has continued to apply the core requirements of Title II even to nondominant carriers. Accordingly, the Commission should promptly deny the BellSouth petition.

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REPLY COMMENTS OF
MCLEODUSA TELECOMMUNICATIONS SERVICES, INC.

McLeodUSA Telecommunications Services, Inc. ("McLeodUSA") submits these reply comments concerning the above-captioned petition filed by BellSouth requesting forbearance from application to "broadband" of Title II requirements and *Computer II/III* safeguards. For the reasons stated herein as well as in initial comments filed by McLeodUSA, the Commission should deny the petition.

I. BOCS UNLAWFULLY IGNORE THE WHOLESALE MARKET

Like BellSouth, BOCs and others supporting BellSouth's petition fail to address or acknowledge the absence of wholesale intermodal broadband competition. The courts have found that forbearance from dominant carrier regulation requires "a painstaking analysis of market conditions" supported by evidence.[1] An adequate analysis of intermodal broadband competition would identify the product and geographic markets, the firms that participate in

1 *WorldCom, Inc. v. FCC*, 238 F.3d 449, 459 (D.C. Cir. 2001) ; *AT&T Corp. v. FCC*, 236 F.3d 729, 735-737 (D.C. Cir. 2001).

those markets, calculate market shares, and address possible barriers to entry.[2] However, like BellSouth, other BOCs fail to even attempt to identify the particular markets in which they seek regulatory relief either in terms of services or geographic markets even though the Commission has recognized that the retail services product market is distinct from the wholesale product market.[3]

Instead, BOCs merely request forbearance from application of any regulation to "broadband." Broadband, in turn, is not defined as a service but as a technology, *i.e.* "technologies that are capable of providing 200 kbps in both directions."[4] Even here they disagree, however, with SBC urging forbearance for a different technology definition.[5] Although the BOCs have submitted information purporting to show intermodal competition, it is not accompanied by any analysis of markets, let alone the "painstaking" and rigorous analysis required by the courts. Absent information concerning the wholesale market, BellSouth and its supporters fail to make a threshold showing sufficient for the Commission to consider forbearance. For this reason alone, the BellSouth petition must be denied. It is also worth pointing out that requesting forbearance for a technology is nonsensical since the Commission does not apply Title II regulation to technologies but to telecommunications services.

In any event, even if the BOCs had attempted to identify the particular markets for which they seek forbearance, they have submitted no information at all showing intermodal competition in the wholesale market. Although BOCs have made some factual showing regarding intermodal

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2 *See, e.g., Application of Echostar Communications Corp. et al*, Hearing Designation Order, CS Docket No. 01-348, 17 FCC Rcd 20559 (2002) at paras. 105-150; Horizontal Merger Guidelines, U.S. Department of Justice and Federal Trade Commission, April 2, 1992, revised April 8, 1997.

3 Deployment of Wireline Services Offering Advanced Telecommunications Capability, Second Report and Order, 14 FCC Rcd 19237, para. 8 (1999).

4 BellSouth Petition at 1 n. 1.

5 SBC urges forbearance for services that offer service of 200 kbps in one direction. SBC Comments at 2, n. 4.

competition, it is limited to showings concerning retail competition at the national level for a particular service – cable modem Internet access service. Thus, BOCs call to the Commission's attention the fact that ILEC DSL-based Internet access service and cable modem service have roughly split shares for the retail market. Absent a showing that there is significant wholesale intermodal broadband competition, there is no basis for the Commission to find under Section 10(a)(1) that application of *Computer II/III* and Title II regulation is unnecessary to assure that rates for BellSouth's broadband access services will be just, reasonable, and nondiscriminatory.

BOCs failure to address the wholesale market is a crucial omission because in *Computer II/III* the Commission sought to preserve wholesale offerings. The *Computer II/III* safeguards that BOCs want eliminated were deemed necessary by the Commission precisely because there were no wholesale alternatives available to independent providers that did not possess last mile connections to customer premises. Thus, BOC showings of intermodal retail competition are irrelevant to the forbearance relief requested because the *Computer II/III* safeguards are focused on wholesale services provided to ISPs, not the retail services BOCs discuss. In this connection, independent broadband service providers do not have any serious last mile alternatives to the current ILEC wholesale common carrier offerings for reaching customers' premises. Although independent providers compete against each other, they are all dependent on ILECs' last mile connections. Thus, *Computer II/III* safeguards remain as valid and necessary today as when they were adopted.

To emphasize further that independent providers lack wholesale alternatives, cable operators' cable modem offerings are not sufficient to constrain incumbents' market power in the wholesale market for a number of reasons. First, cable operators are under no obligation to make

any such offering to competing providers and they do not do so. Cable operators are under no obligation to make such offerings because the Commission in the *Cable Modem Declaratory Ruling* erroneously determined that the transmission component of cable modem service is not a telecommunications service.[6] The 9th Circuit reversed that decision but instead of choosing to follow through on the obvious consequence that cable operators must offer the underlying transmission component to other providers on a common carrier basis, the Commission has chosen to appeal that decision to the Supreme Court.[7] At this point, cable operators' broadband transmission services are considered "private carriage" which means essentially that they may choose to whom they will provide service and on what terms and conditions.

Earthlink, which as an ISP is well positioned to know if cable operators make wholesale offerings to ISPs, affirms that with limited exceptions cable operators refuse to sell transmission service to unaffiliated ISPs. Earthlink affirms that there is not a competitive wholesale market for the last mile and other services they need to provide their broadband retail services.[8] Commenters, like BellSouth, provide no evidence that ISPs have wholesale alternatives to ILECs' service. Of course, even if there were such cable alternatives, this would show only the existence of a duopoly which, as explained elsewhere in these comments, is insufficient to assure that prices are reasonable and nondiscriminatory.

And, apart from the absence of any wholesale offering by cable operators, cable operators do not for the most part serve business customers. Broadband service providers that want to

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6 *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Internet Over Cable Declaratory Ruling, Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities, Declaratory Ruling and Notice of Proposed Rulemaking*, 17 FCC Rcd 4798 (2002) ("*Cable Modem Declaratory Ruling*").

7 *Brand X Internet Services v. FCC*, 345 F. 3d 1120 (9th Cir. 2004), *petition for cert. granted*, 2004 U.S. Lexis 7980 (U.S. Dec. 3, 2004)(No. 04-281).

8 Earthlink Comments at 19. *See also* Opposition of the Federation of Internet Solution Providers of America at 28-33.

serve business customers do not have any possibility at the present time of a cable alternative to ILEC broadband wholesale services.[9] Cable modem service is not an adequate alternative to ILEC services because it is unsuited for most business customers' needs for a number of reasons, including that it is asymmetrical, relatively low bandwidth, and without sufficient reliability and security.[10] Therefore, cable operators are unable to provide a serious wholesale alternative to serve business customers even if they were otherwise willing to do so. In fact, fewer than 1% of cable modem subscribers are medium or large businesses or government entities, based on recent figures.[11]

Finally, even if there were some wholesale intermodal competition for last mile connections, it does not follow that all Title II regulation may be eliminated. In particular, the Commission has always applied the fundamental obligations of Title II – nondiscrimination, reasonable rates, and the possibility of complaints - to all telecommunications carriers even to those found nondominant.[12] The mere existence of competition is not a sufficient basis for eliminating these Title II obligations. Therefore, the requested forbearance must be denied even if there were sufficient wholesale intermodal competition to make BellSouth nondominant in that market.

II. THE PETITION SEEKS DEREGULATION OF SPECIAL ACCESS SERVICES

As pointed out above, BellSouth and supporting commenters fail to provide any analysis of services or product markets for which they seek forbearance. Instead, they seek forbearance

9 *Id*.

10 Cbeyond Ex Parte Letter, WC Docket No. 04-313, November 19, 2004.

11 *High-Speed Services for Internet Access: Status as of June 30, 2003*, Industry Analysis and Technology Division, Wireline Competition Bureau (December 2003), Table 1 and Table 3.

12 *Motion of AT&T Corp. To Be Reclassified As A Non-Dominant Carrier*, 11 FCC Rcd 3271, para. 13 (1995).

for any technology that permits two way communications greater than 200 kbps. The petition should be denied, if for no other reason, because the petition envisions deregulation of special access services in that special access services frequently have a capability far in excess of 200 kbps. Characteristically, BellSouth fails to acknowledge that special access is apparently within the scope of the requested relief. Nor do other BOCs address, much less demonstrate, that there is any basis for dispensing with the Commission's regulatory program governing special access, although that program is in serious need of reform.[13]

The possibility that special access is encompassed within the requested relief is very disturbing because BellSouth has shown that it has the incentive and ability to discriminate in that market. In December 2004, the Commission found that BellSouth had engaged in unlawful discrimination in the provision of special access service by offering greater discounts to BellSouth's long distance affiliate than to non-affiliated competitors.[14]

In the *Dom/Non-Dom Proceeding*, in which the Commission is considering some of the relief encompassed by the BellSouth petition, the Commission specifically excluded special access from consideration.[15] The same approach should apply here. Although the petition should be denied in its entirety, the Commission should categorically exclude special access from consideration in this proceeding.

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13 *Wireline Competition Bureau Seeks Comment on AT&T's Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access*, Public Notice, RM No. 10593, DA 02-2913, released October 29, 2002.

14 *AT&T Corp. v. BellSouth Telecommunications, Inc.*, Memorandum Opinion and Order, FCC 04-278, EB-04-MD-010 (Dec. 9, 2004).

15 *Review of* Regulatory *Requirements for Incumbent LEC Transmission of Broadband Services*, Notice of Proposed *Rulemaking*, 16 FCC Rcd 22745, 22758 ¶ 22 (2001)("*Dom-NonDom Proceeding*").

III. TITLE II AND *COMPUTER INQUIRY* SAFEGUARDS REMAIN NECESSARY

A. ILEC Comments Confirm That They Retain Market Power

While the ILECs claim they lack market power because of cable companies' provision of some broadband information services, nothing in their filed comments presents any new evidence contradicting the decades of precedent providing that the presence of two competitors in a market means the firms share market power so that both firms retain an incentive to exclude competitors and raise consumer's rates. Moreover, cable provides such a nominal competitor in the business market that the ILECs retain sole market power there. Thus, in both the residential and business markets the protections of Title II and the Commission's *Computer Inquiry* rules remain necessary and in the public interest.

1. ILECs Share Market Power in the Residential Market

The Commission has previously found that competition sufficient to eliminate the need for regulation will not exist in a market divided between two firms.[16] In particular, a duopoly in a market is the equivalent of a monopoly because, "firms in a concentrated market … in effect share monopoly power by recognizing their shared economic interests and their interdependence with respect to price and output decisions."[17] A "durable duopoly affords both the opportunity and incentive for both firms to coordinate to increase prices."[18] Thus, at a minimum, even where the ILECs share their broadband monopoly with cable they have market power and the incentive to abuse that power.

16 *See EchoStar-DirecTV Merger Order,* 17 FCC Rcd 20559, para. 103 (2002).

17 *Brooke Group v. Brown & Williamson*, 509 US 209, 227 (1993).

18 *FTC v. Heinz*, 246 F.3d 708, 725 (D.C. Cir. 2001).

There are, of course, areas throughout the country where both cable and DSL are unavailable. As AT&T observes, many mass market consumers lack access to cable modem service.[19] The Nebraska Rural Independent Companies also agree that BellSouth's data regarding cable's broadband market share does not indicate a sufficiently competitive market that would ensure just and reasonable charges.[20] For example, NECA recognizes that the "current level of broadband deployment in small rural markets" would not be possible without the current Title II regulatory structure.

Further, there is no reliable evidence to suggest that new intermodal alternatives will change the broadband mass market from a duopoly to a fully competitive market. Nor is there evidence that any "of these technologies and service categories has yet posed anything like a significant antidote to the incumbents market power."[21] Verizon for example does not even dispute the assertion that competition today from satellite, BPL and other technologies is minimal to the point of being irrelevant.[22] Instead, Verizon claims the Commission must predict "future market conditions" rather than simply assess the market conditions today, citing to snippets of the Commission's decision in the *Bell Atlantic-Nynex Merger Order*.[23] However, the Commission should not give any significant weight to future intermodal competition.

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19 AT&T Comments at 41.

20 Nebraska Rural Independents Comments at 3.

21 *See* Rulemaking To Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services) Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rulemaking, 12 FCC Rcd 12545, 12618 ¶ 165 (1997) ("LMDS Order")

22 Verizon Petition at 6-7.

23 *Applications of Nynex Corp, Transferor, and Bell Atlantic Corp., Transferee, for Consent to Transfer Control of NYNEX Corp. and its Subsidiaries*, 12 FCC Rcd 19985 (1997) ("*Bell Atlantic-Nynex Merger Order*").

First, Verizon's reliance on the *Bell Atlantic-Nynex Merger Order* is misplaced. In that order, the Commission stated that it had the ability to use predictive judgments to assess how the merger might effect competition in the future. But nowhere did the Commission state that it must do so or that it could evaluate more generally the future status of competition in the larger broadband market. The Commission can and should decide this petition based on the conditions of the market today rather than attempting to make predictive judgments for which there is little basis.[24]

Second, Verizon misconstrues the scope of the Commission's authority to make predictive judgments cited in the *Bell Atlantic-Nynex Merger Order*.[25] In Paragraph 7, cited by Verizon, the Commission simply observed that its merger order would examine markets as it expects them to be after a Bell Company receives 271 authorization, and "the most critical provisions of Sections 251 and 252" have been implemented.[26] Thus, the Commission did not go so far as to predict the commercial and technological viability of technologies that have yet to be deployed to consumers on any wide scale but assumed the completion of several regulatory proceedings that were under way. Rather, as the Commission observed in the *LMDS Order*, when "none of these technologies and service categories has yet posed anything like a significant antidote to the incumbent's market power" the Commission's analysis should emphasize current market conditions and the incumbent's current market power.[27]

Regardless of the Commission's authority to make predictive judgments regarding the evolution of communications markets there must be a "sufficient relationship between the

24 *See LMDS Order*, ¶ 164.

25 Verizon Petition at 7.

26 *Bell Atlantic-Nynex Merger Order* ¶ 7.

27 *See LMDS Order*, ¶ 165.

Commission's conclusion and the factual bases in the record upon which it relied to substantively support this exercise of its authority."[28] The Commission, even when making predictive judgments, remains bound to explain:

> the reasons why (it) chooses to follow one course rather than another. Where that choice purports to be based on the experience of certain determinable facts, the (agency) must, in form as well as substance, find those facts from evidence in the record. By the same token, when the (agency) is obliged to make policy judgments where no factual certainties exist or where facts alone do not provide the answer, (it) should so state and go on to identify the considerations (it) found persuasive."[29]

Thus, the ability to render predictive judgments using the "public interest" standard in Section 10(a)(3) does not confer unfettered discretion on the agency administering it.[30] Put simply, while the Commission is not bound by the standard of proof required in the courts, the Commission remains bound to rest its predictions on fact rather than fantasy. As the Commission is painfully aware, predictions of future competition from the electric power industry and wireless broadband technology have been plentiful over the last decade and before. However these predictions have yet to come true. Given the history of empty promises and inaccurate predictions, the Commission cannot easily justify Bellsouth's ambitious forbearance proposal on the basis of predictions that have without exception proved overly optimistic.

In previous orders, the Commission has refrained from speculation regarding the development of alternative last mile technologies. In the 1997 *LMDS Order*, the Commission restricted cable companies' and ILECs' ability to obtain LMDS licenses in their own local markets. The Commission observed that despite claims that there were sources of likely or

28 *United States v. Allegheny-Ludlum Steel Co.*,406 U.S. 742, 755-56 (1972).

29 *Air Products & Chemicals, Inc. v. Federal Energy Regulatory Commission*, 650 F.2d 687, 699 (5th Cir. 1981).

30 *American Postal Workers Union, AFL-CIO v. U.S. Postal Service*, 891 F.2d 304, 308 (D.C.Cir. 1989).

potential competition, the current incumbents had market power.[31] Thus "however optimistic those beliefs may be, they do not change the fact that, at this time, LECs and cable firms hold market power."[32] The Commission thus determined that "to assert that competition from these various sources is likely to arise requires a great deal of speculation."[33] Because "none of these technologies and service categories has yet posed anything like a significant antidote to the incumbents market power," the Commission is justified declining to predict their impact on the market in the future.[34]

The failure of previous efforts to provide wireless broadband access are well documented and the current efforts at delivering wireless broadband are still in the developmental stages. As the WSJ recently observed:

> "Wireless-broadband services have a rocky history. Companies such as Winstar and Teligent tried to offer similar services during the telecom boom of the late 1990s, with limited success. Sprint's efforts with so-called fixed-wireless technology led to a $1.2 billion write-down.
>
> For the technology to get even more affordable, experts say the much-hyped WiMAX technology needs to be certified and standardized, which could still be a year away, and another year after that before it is widely available in laptops and other devices."[35]

31 *See LMDS Order*, ¶ 164

32 *See LMDS Order*, ¶ 164.

33 *Id*.

34 I*d.*

35 Jesse Drucker and Almar Latour, Internet and Phone Companies Plot Wireless-Broadband Push, The Wall Street Journal, January 20, 2005, p. A10, viewed January 24, 2005 at http://online.wsj.com/article_print/0,,SB110617646006230682,00.html.

Similarly, the Commission has predicted competition from electric utility communications services for years and no viable competition has yet to take root.[36] The Commission has considered promises of advanced fiber deployments for decades and they have yet to derive any broad benefit to consumers.[37]

Market conditions today unequivocally show that there is currently no viable large-scale competitor to DSL or cable modem broadband services.[38] Simply because technical developments are occurring does not mean that new entrants are successfully entering the market and providing competitive services. In the face of facts that current entrants have not been able to establish a foothold in the market the Commission should decline the BOC invitation to predict that the future of BPL, WiMAX and other nascent technologies will succeed where others have failed. Commenters in this proceeding typically agree that elimination of *Computer Inquiry* and Title II safeguards based on the hype surrounding 3G, Wi-MAX or BPL without any demonstrated commercial success would be arbitrary and capricious.[39]

2. ILECs Maintain Market Power in the Enterprise Market

While the ILECs may in some aspects of the residential market share market power with cable providers, in the business market the ILECs solely possess it. While Verizon claims that the business market is intensely competitive, it fails to acknowledge that the carriers to whom Verizon attributes the competition, rely on the ILEC for provision of the last mile facilities

36 *1995 Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 11 FCC Rcd 2060, ¶ 120 (1995) (Commission observed that electric utilities have incurred substantial costs to deploy a network that reaches nearly every household in the country could compete with cable companies).

37 See e.g. Robert Pepper, *Through The Looking Glass: Integrated Broadband Networks, Regulatory Policies, And Institutional Change*, Office of Policy and Plans Working Paper No. 24, ¶¶ 21, 24 (1988).

38 See Comments of FDN Communications et al. at 18.

39 *See* ITAA Comments at 6-7.

necessary to provide broadband service.[40] Verizon's specious claim that the business broadband market is competitive rests on discussions at ¶ 292 of the *Triennial Review Order* concerning the impact of cable broadband on the need for unbundled hybrid loops in the residential market.

To the contrary, however, the *Triennial Review Order*'s findings on competitive impairment in the business market remain persuasive.[41] Competitors face "steep economic barriers" to the deployment of last mile broadband facilities,[42] that "typically make duplication of such facilities uneconomic."[43] It is natural then that competitors have built their own last mile broadband facilities to a small percentage of business customers.[44] Leading facilities-based CLECs such as TWTC rely on ILEC provided loop facilities at 75% of its customer locations.[45]

ILEC commenters also contend that cable has emerged as a viable competitor in the business market eliminating the ILECs' market power.[46] The BOCs make fanciful claims that are wholly lacking in evidentiary support. In fact, the Commission has recently observed that "[c]able modem service is primarily residential service."[47] In many markets, cable networks pass, let alone serve, only a quarter of all business customers.[48] Initial comments filed in this

40 *See* AT&T Comments at 36-37.

41 *See* TWTC et al. Comments at 9.

42 *See Triennial Review Order*, ¶ 199.

43 Separate Statement of Commissioner Kathleen Abernathy, *Triennial Review Remand Order* Press Release, *Unbundled Access to Network Elements*, WC Docket 04-313, *Review of Section 251 Unbundling Obligations of Incumbent Local exchange Carriers*, CC Docket 01-338 (rel Dec. 15, 2004).

44 *See* TWTC Comments at 9 *citing* BOC 2004 UNE Report, WC Docket 04-313, Filed Oct. 4, 2004 at p. I-2.

45 *See* TWTC Comments at 10.

46 Verizon Petition at 5-6.

47 *Advanced Services Fourth Report*, 19 FCC Rcd 20540 at p. 14.

48 Ex parte letter of Jonathan Banks, Bellsouth, to Marlene H,. Dortch, FCC, *Unbundled Access to Network Elements*, WC Docket 04-313, *Review of Section 251 Unbundling Obligations of Incumbent Local exchange Carriers*, CC Docket 01-338 at 5 (filed Nov. 8, 2004).

proceeding, and as discussed above, demonstrate that currently cable modem service for a number of reasons is not a substitute for ILEC supplied wholesale loop facilities.[49]

In light of this evidence, it is no surprise that the Commission in the *Triennial Review Remand Order* rejected ILEC requests for elimination of their obligation to provide unbundled access to high capacity loop and transport facilities. In rejecting the BOC claim that competitors do not need access to the BOC last mile broadband facilities, Chairman Powell explained that "the record and our analysis demonstrated that competitors still depended significantly on them in the overwhelming majority of markets and, thus, we have required unbundling in those circumstances."[50]

Consistent with the Commission's decision in *TRO Remand Order*, the Commission should retain *Computer II/III* safeguards and Title II requirements because broadband competitors wholly rely on ILEC last mile facilities in the enterprise market even if there is duopoly in the mass market, which as explained, is in any event insufficient to justify forbearance.

B. Initial Comments Provide No Assurance That the ILECs Will Refrain From Exercising Market Power To Exclude Competitors in the IP-Enabled Marketplace

Essential to a forbearance analysis under Section 10 is the principle that sufficient competition among entrants may supplant the need for the regulation. Where such competition has yet to take root, commitments from the market participants that they will refrain from acting on their incentive to abuse extensive market power should be expected. But no such commitments can be found in the comments of the BOCs. Far from providing assurance of

49 *See* TWTC Comments at 11-13.

50 Separate Statement of Chairman Powell, *Triennial Review Remand Order* Press Release, WC Docket No. 04-313, December 15, 2004..

nondiscrimination, BOCs contend that there broadband offerings should at most be considered "private carriage."[51] The cornerstone of private carriage, however, is that the carrier may choose on an individual basis with whom to deal and on what terms and conditions to provide service. Thus, in effect, BellSouth and BOCs candidly ask for the ability to discriminate against competitors and even deny access entirely to them. As already explained in initial comments, BOCs will have substantial incentives to discriminate against competitors in the IP enabled marketplace.[52] On the present record, BOC efforts to obtain the legal permission to discriminate against competitors requires denial of the BellSouth petition.

C. ILECs Fail to Justify the Unprecedented Step of Forbearance from Application of Title II and *Computer Inquiry* Safeguards to Non-dominant Providers

When a market becomes sufficiently competitive so that some previous regulation becomes unnecessary, core Title II requirements that assure reasonable and nondiscriminatory rates, terms, and conditions of service and the ability of consumers and that permit competitors to file complaints are retained. Thus, in relieving interexchange carriers of many of the requirements implementing Title II, the Commission retained the Title II prohibitions against unjust and unreasonable practices and discriminatory pricing, as well as the right of consumers to file complaints arising under sections 201-202.[53] Likewise, interexchange carriers remain obligated to resell their services under Commission regulations.[54]

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51 See e.g. Qwest Comments at 7-8; SBC Comments at 10-11; Verizon Petition at 10-11.

52 *See* McLeodUSA Comments at 3.

53 *Motion of AT&T Corp. To Be Reclassified As A Non-Dominant Carrier*, 11 FCC Rcd 3271, ¶ 13 (1995).

54 *Id.*

Even if forbearance were otherwise justified, which it is not, the ILECs provide no justification that warrants affording them greater relief from regulatory requirements than those the Commission has provided when other market become competitive. To the extent there is competition that could justify non-dominant treatment for some ILEC broadband services, there is no basis for the Commission to take the unprecedented step of dispensing entirely with Title II and its key implementing requirements such as *Computer II/III* safeguards.

IV. RURAL LECS RELY ON USF FUNDING TO BUILD OUT BROADBAND NETWORKS

Rural telephone companies oppose the Bellsouth petition. These companies recognize that the current regulatory structure benefits the deployment of broadband, particularly to rural markets where there are no suitable alternatives including cable available to consumers and the telephone network remains the sole source of delivering broadband capability.

The rural carriers that filed comments in opposition to Bellsouth's petition argue forcefully that elimination of Title II regulation for broadband would make it "difficult, if not impossible for rural, high-cost companies to recover their network costs," which in turn would lead to "an increase in the rate" for broadband services.[55] As NCTA explains "the high cost of providing service in thinly populated rural regions of the country would prevent some smaller telephone companies from offering such services on a deregulated basis."[56]

Similarly the ability of carriers to offer broadband service through tariffs and pooling would be jeopardized. As NCTA explains " today's levels of broadband deployment in small rural markets simply would not exists without the benefits of NECA's tariffs and pools."[57]

55 *See* Nebraska Rural Telephone Comments at 8-9.

56 *See* NTCA Comments at 2.

57 *See* NTCA Comments at 3.

NECA explains the benefits of its tariff and revenue pool in terms of support for rural broadband, stability and security for the carriers that deploy service.[58]

As with so many other important issues, BellSouth in its petition and supporting commenters totally ignore the impact of forbearance on rural ILECs. The potential impact on rural ILECs precludes the Commission from finding that forbearance would serve the public interest as required under Section 10(a)(3).

V. CONCLUSION

For these reasons, the Commission should deny the above-captioned petition.

Respectfully submitted,

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58 *See* NECA Comments at 4.